IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 408.

TRUST UNDER AGREEMENT DATED DECEMBER 30, 1921 BY JOHN E. ANDRUS, DECEASED (TRUST NO. 1), CENTRAL HANOVER BANK AND TRUST COMPANY, HAMLIN F. ANDRUS, and WILLIAM H. TAYLOR, Trustees,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

REPLY BRIEF FOR PETITIONERS.

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Respondent divides his argument into three numbered parts. This reply memorandum will be numbered to correspond with those respective parts.

(1) Respondent says (p. 6) that the legislative history of Section 117 shows that gross income includes only the income percentage taken into account. There is nothing in the legislative history that shows any such thing and the fact that there is not, is itself significant in opposition to the respondent's argument and the decision below, since both seek to controvert

the clear wording of the statute. There is a reference in one Committee report to "gross income *subject to tax*", but that is of course to *taxable* gross income, which is an entirely different concept from unqualified and statutorily defined "gross income", as the opinion of the Tax Court points out (R. 9).

Respondent also argues (pp. 6-7), that the portion of capital gain not taken into account in computing *net* income must likewise come out of *gross* income. This argument was anticipated on page 7 of the petition and is there answered. Respondent assumes an amiable arithmetic pattern that the tax statute itself denies.

(2) Respondent points out (p. 7) that this case is the first judicial determination of the matter. Respondent is correct. It is the first, and because of its importance and scope, it calls for the voice of this Court at this very stage, to eliminate the strife that is otherwise sure to be engendered.

Respondent says (p. 7) the decision below puts the case in harmony with other decisions of the Tax Court. The Tax Court would hardly think so. The Tax Court premised its opinion in the present case on those very decisions on the strength of either their likeness or differences.

Respondent also says (pp. 7-8) that the Supreme Court opinions about liberal construction where charity is involved do not apply because Section 162(a) is not here involved for interpretation. That is an amazing contention. This whole case pivots around Section 162(a). Besides, there is nothing about the Supreme Court's pronouncements that limit to Section 162(a) the doctrine of liberal construction

to charity. To the contrary, its opinions show that for *all* tax purposes, charities are to be favored.

On page 8, respondent makes reference to a tax windfall. There is no such thing involved here unless that is the characterization to be applied to the express mandate of the statute. Congress wanted one-half the capital gains to be free of tax to everybody. Congress also wanted to favor charity. Respondent's argument and the decision below do neither.

(3) Respondent says (p. 8) that the principle of the *Dobson* case is inapplicable because we are here dealing with a clean-cut question of law. Actually, the question we have here is of the very nature for which the court below had previously said the *Dobson* doctrine was shaped. (See pp. 10-12 of petition.)

It is undisputed that *all estates and trusts in which charity is a beneficiary and capital gains are realized have a stake in this case.* For the reasons outlined in the petition and supplemented here, petitioners renew their prayer that a writ of certiorari be granted.

November 1947.

J. S. Seidman,
Counsel for Petitioners.